

December 27, 2018

VIA E-MAIL -BRAD.SHELTON@WATERBOARDS.CA.GOV

Mr. Brad Shelton
11020 Sun Center Drive, # 200
Rancho Cordova, CA

Re: Proposed Waste Discharge Requirement Order for Musco Olive Products, Inc.

Dear Mr. Shelton:

Although Musco Products ("Musco") is generally supportive of the Central Valley Regional Water Quality Control Board's ("Regional Board") proposed Waste Discharge Requirements ("WDRs") and appreciates most of the proposed modifications to the WDRs for the Musco Family Olive Company's Tracy Plant ("Tracy Facility"), Musco objects to the application of California Code of Regulations, Title 27 (hereinafter Title 27) to its Tracy Facility operations, and to the proposed WDR provisions regarding Financial Assurances.

Title 27 Exemption

As part of its Tracy Facility operations, Musco operates a series of surface water impoundments that hold olive brining process wastewater, which were designated as a Class II facility. As with other discharges to land, the Regional Board regulates these impoundments through the issuance of WDRs. According to the proposed updates to the WDRs, Musco's Tracy Facility operations are specified as being subject to Title 27, which contains regulatory requirements for the treatment, storage, processing, and disposal of solid waste. However, Title 27 exempts certain listed activities from these regulatory requirements, including wastewater discharges that meet certain preconditions.

Musco's discharges should be deemed exempt from Title 27 pursuant to provisions that apply to wastewater under specific conditions. The exemption, found at Title 27, Section 20090(b) is described below:

- (b) Wastewater - Discharges of wastewater to land, including but not limited to evaporation ponds, percolation ponds, or subsurface leach fields if the following conditions are met:

- (1) the applicable RWQCB has issued WDRs, water recycling requirements, or waived the issuance;
- (2) the discharge is in compliance with the applicable water quality control plan; and
- (3) the wastewater does not need to be managed according to Chapter 11, Division 4.5, Title 22 of this code as a hazardous waste.

The Tracy Facility's storage ponds hold wastewater generated by olive processing and canning operations. The conditional exemption set forth in Title 27, Section 20090(b) (i.e., wastewater exemption) should be applied to these ponds since they meet the preconditions set forth in that exemption regulation.¹ The wastewater discharges at Musco's Tracy Facility easily meet the three preconditions:

1. The Tracy Facility discharges are (and have for many years been) subject to WDRs, the most recent of which is currently in the process of being updated and revised, and is the subject of this comment letter;
2. The Tracy Facility ponds are double lined with flexible membrane synthetic liners and have been constructed to prevent discharges to groundwater, thus protecting water quality in compliance with the Basin Plan²; and
3. The Tracy Facility wastewater is primarily saline brine derived from processing olives for human consumption. This wastewater is not classified as hazardous waste. In fact, Finding 7 of Musco's WDRs, Order No. 2014-0125, specifically identifies this water as non-hazardous.

Based on the foregoing, Musco should be exempt from the State Water Resources Control Board ("SWRCB") promulgated provisions related to the treatment, storage, processing and/or disposal

¹ See also Title 23, Chapter 15, §2511 (similar exemptions from Water Board Chapter 15 requirements)[Note: Sections 2532 and 2533 regarding Class II waste management units and Class III non-hazardous solid waste landfills have been repealed]. Musco's facility may also meet the requirements of Title 27, section 20090(i) for Fully Enclosed Units since the waste is confined in fully enclosed facilities (i.e., demonstrated not to leak) of limited areal extent.

² The applicable Basin Plan does not contain salinity objectives for groundwater except for incorporating by reference the "Consumer Acceptance Contaminant Level Ranges" in Title 22, Table 64449-B for waters designated for municipal and domestic supply ("MUN") use. These ranges were intended to apply to water served to the public by community water systems, and only require monitoring of groundwater sources every three years. 22 C.C.R. §64449(b). No fixed consumer acceptance level has been established. 22 C.C.R. §64449(d). In addition, these objectives do not require improvement over naturally occurring background concentrations. See *Sacramento and San Joaquin River Basins*, Basin Plan at p. 3-16.

of solid waste set forth in Title 27.³ Granting an exemption should be based on one of the following demonstrations, consistent with principles of the Antidegradation Policy:

1. The discharge will not cause degradation of groundwater quality over baseline conditions, *or*
2. Best practicable treatment and control measures are in place to ensure that consequent groundwater degradation is quantified, below water quality objectives, and consistent with maximum benefit to the people of the State.

If one of the above conditions is met, the discharge would continue to be regulated under the WDR Program. Only if neither of the above conditions is able to be met would the discharge be required to meet the Title 27 regulations.⁴ Because of the current handling of the Musco ponds and the leak detection monitoring in place under the WDRs, there is no discharge to groundwater thereby ensuring no degradation of groundwater quality. In addition, Musco has Best Practicable Treatment and Control (“BPTC”) measures in place, including fully lined ponds, full segregation of brine waste in the facility, leak detection of primary and secondary liners at the time of construction and continued testing for transmissivity, and liner specifications that exceed the minimum state requirements. Since both of these additional conditions are met, Title 27 regulation is not required.

Financial Assurances

Discharges of food processing waste to land have historically been regulated under the Waste Discharge Requirement (WDR; formerly Non-Chapter 15) Program, and have been considered to be exempt from the full-containment, monitoring, *financial assurance* and corrective action requirements of the Title 27 regulations.⁵ Although the SWRCB’s Title 27 regulations should

³ See e.g. Central Valley Regional Board Order No.98-049 (Castle City Mobile Home Park), p. 2, ¶ 10; Order No. R5-2011-0008 (Brown Sand Mossdale Quarry WDRs), pp. 8-9, ¶ 42; Order No. R5-2010-0124 (Baldwin Contracting Hallwood Aggregate Facility, ¶ 51; and Information Sheet – Order No. R5-2004-0056 (Asphalto Oilfield WDRs), p. 2 exempting discharges from the requirements of *Consolidated Regulations for Treatment, Storage, Processing, or Disposal of Solid Waste* based on the dischargers’ compliance with the preconditions set forth in 27 C.C.R. § 20090(b).

See also Order No. R5-2013-0113 amending Order R5-2007-0113, p.3, ¶ 10 “The Effluent Storage Ponds meet preconditions (1) and (3). However, since the Effluent Storage Ponds are unlined, wastewater contained in the ponds percolates to the underlying groundwater. Therefore, additional evaluation is needed to determine if precondition (2) has been met;” and Order WQ 2009-0005 as amended by Order WQ 2012-0001, p. 20, suggesting that the City of Lodi line its effluent storage ponds to qualify for the exemption set forth in 27 C.C.R. § 20090(b): “The City has several options to address the waste releases from the storage ponds to ensure consistency with Title 27. The City can line the ponds to prevent waste releases to groundwater.” Since the Musco ponds are lined, all preconditions have been met.

⁴ See Central Valley Staff Report, *Regulation of Food Processing Waste Discharges to Land*, p. 10 (https://www.waterboards.ca.gov/rwqcb5/water_issues/waste_to_land/food_processing/staffrpt.pdf).

⁵ *Id.*; see also Title 27, California Code of Regulations (CCR), Division 2, Subdivision 1, Consolidated Regulations for Treatment, Storage, Processing, or Disposal of Solid Waste, §20005, et seq. Regional Water Boards can utilize the Title 27 CalRecycle standards only “where necessary to protect water quality.” 27 C.C.R. §20012.

not apply to Musco's ponds for the reasons set forth above, should the Regional Board continue to apply Title 27 to the Tracy Facility operations, Musco must be permitted to determine its preferred method of compliance with Title 27's Financial Assurances provisions.

As you are aware, the issue of Financial Assurances has been a topic of discussion between Musco and the Regional Board for at least the past four years. Prior iterations of the Tracy Facility WDRs' sections on Financial Assurances were drafted to permit the use of the many non-funded options including a Guarantee, Insurance, Letter of Credit, Pledge of Revenue, Surety Bond, or other State Approved Mechanism as set forth in Title 27 Section 22228, including the Financial Means Test.⁶ However, in the newest iteration of proposed WDRs, the Regional Board seeks to prohibit use of the Financial Means Test in violation of Water Code Sections 13360,⁷ 13000 and 13263.

Pursuant to the California Integrated Waste Management Board (CIWMB/now CalRecycle) Title 27 regulations, requirements for closure and corrective action funding are not specifically applicable to Class II or Class III surface impoundments, such as Musco's ponds.⁸ However, the SWRCB adopted its own rules for closure and corrective action, making such requirements applicable to Class II and Class III Waste Management Units ("WMUs"). *See* 27 CCR § 22207(a) and § 22222.⁹ The SWRCB-promulgated regulations in Title 27 Sections 22222 and

⁶ According to 27 C.C.R. § 22228, an operator subject to Title 27's Financial Assurances requirements, "shall use any one, or any combination of [an exhaustive list] of mechanisms," which include the Financial Means Test, among other options.

⁷ Cal. Wat. Code § 13360 (a) ("No waste discharge requirement or other order of a regional board or the state board or decree of a court issued under this division shall specify the design, location, type of construction, or particular manner in which compliance may be had with that requirement, order, or decree, and the person so ordered shall be permitted to comply with the order in any lawful manner. ...")(emphasis added).

⁸ *See e.g.*, Title 27, sections 22205 and 22220, making closure requirements applicable to "solid waste landfills." Further, since Musco's ponds are lined and no leaks have been seen, corrective action is unlikely to be required and, therefore, funded.

⁹ 27 C.C.R. § 22207(a) ("Unit Closure Funding - At Class II and Class III Units for which the CIWMB does not require a closure fund, the RWQCB shall require the discharger to establish an irrevocable closure fund (or to provide other means) pursuant to the CIWMB-promulgated sections of this chapter but with the RWQCB named as beneficiary, to ensure closure of each classified Unit in accordance with an approved plan meeting all applicable SWRCB-promulgated requirements of this subdivision. For solid waste disposal sites, the RWQCB shall coordinate with the CIWMB, pursuant to s[ection] 20950(f).")

27 C.C.R. § 22222 ("The requirements of this section apply to dischargers who own or operate a Class II or Class III waste management unit (Unit). This section does not apply to discharges of mining waste to mining waste management units (mining Units). [Note: The requirements of this paragraph do not preclude the RWQCB (under authority other than this subdivision) from requiring financial assurance for a known or reasonably foreseeable release at a mining Unit.] At Units for which the CIWMB does not require financial assurances for corrective action, the RWQCB shall require the discharger to establish an irrevocable fund (or to provide other means) pursuant to the CIWMB-promulgated sections of this chapter but with the RWQCB named as beneficiary, to ensure funds are available to address a known or reasonably foreseeable release from the Unit, pursuant to §20380(b). For addressing a known or reasonably foreseeable release at a solid waste landfill, the RWQCB shall coordinate with the CIWMB, pursuant to §20380(b) and in a manner consistent with s[ection] 20950(f).")

22207 generally provide that the Regional Board shall require the discharger to establish an irrevocable fund pursuant to the CalRecycle Title 27 regulations, with the Regional Board named as beneficiary. However, those SWRCB regulations further provide in parenthetical language that the discharger may also “provide other means” of funding pursuant to the CalRecycle regulations in Title 27.¹⁰ Since CalRecycle does not require *any* closure or corrective action funds for surface impoundments (i.e., Class II or III units), all of the possible financial assurance mechanisms set forth in Title 27, Section 22228 should be authorized for use by Musco. The itemized list of financial assurance mechanisms in Section 22228 includes the Financial Means Test, among other options. Further, nothing in Section 22246, describing the Financial Means Test, specifically prohibits its use for corrective action or closure costs.¹¹

We further point out that the Regional Board prohibition on use of the Financial Means Test in this context is contradictory to Sections 13000, 13263, and 13360 of the California Water Code. Sections 13000 and 13263 provide that reasonableness and all values are to be considered in regulating waters of the State, including economic and social values. While Musco fully understands there may be concerns associated with using the Financial Means Test as a financial assurance mechanism for a private entity, Musco believes that it is in the best interest of the State as well as the discharger to use this mechanism. Large amounts of cash sequestered in a trust fund creates a financial hardship for Musco and significantly reduces its ability to invest in new infrastructure, including waste water treatment equipment, renewable energy, and future sustainability projects. Furthermore, funds are only necessary to be available to cover the actual cost of closure at the time of closure and not before. Musco therefore proposes to: (1) submit an updated Closure Plan and cost estimate that reflects the currently anticipated costs of closure; and (2) continue providing the Regional Board with annual updates to the closure costs to reflect inflation, solids accumulation, and changes in technology that may impact the ultimate cost of closure, along with a certified statement of financial means to cover these costs in their entirety. This financial assurance mechanism, along with the annually updated re-certifications, appropriately balances the needs of all stakeholders in the corrective action/closure process.

Furthermore, Water Code 13360 prohibits the Regional Board from proscribing the manner of compliance with one of its issued orders. The Regional Board has only the authority to “identify the disease and command that it be cured but [can]not dictate the cure.” *Tahoe-Sierra Preservation Council v. State Water Resources Control Board*, 210 Cal.App.3d 1421, 1438 (1989). Indeed, “Section 13360 is a shield against unwarranted interference with the ingenuity of the party subject to a waste discharge requirement. . . It preserves the freedom of persons who

¹⁰ This “provide other means” language is regulatory since not italicized or preceded by a “Note:” 27 C.C.R. §20080(a)(4). Such language may not properly be ignored by the Regional Board as proposed in the WDRs.

¹¹ Title 27, section 21769(a)(2), merely requires that the discharger provides closure and post-closure funds, “through an acceptable financial mechanism,” to achieve the goals of subdivision (a)(1). In addition, the definition of Financial Means test includes costs for Under Title 27, section 22200(bb) “Liabilities” means “probable future sacrifices of economic benefits arising from present obligations to transfer assets or provide services to other entities in the future, as a result of past transactions or events,” which is arguably broad enough to include “operating liability” discussed under Title 27, section 22246(d) and (e) that could cover correction actions and closure that occur during facility operations since operations do not cease until closure.

are subject to a discharge standard to elect between available strategies to comply with that standard.” *Id.* By replacing the more flexible approaches to providing Financial Assurances that have previously been endorsed by the Regional Board with more rigid, proscriptive Financial Assurance requirements that severely limit options available, the Regional Board exceeds its statutory authority. Musco believes that a Financial Means Test is a reasonable and responsible mechanism with which to provide Financial Assurances. Musco therefore proposes to provide a copy of an independent certified public account’s report of the last fiscal year, as required by the Financial Means Test to demonstrate that its ability to cover eventual closure costs.

The Regional Board clearly has authority to permit Musco’s use of the Financial Means Test. Under Title 27, Section 22254 (“State Approved Mechanism”), the Regional Board has broad authority to approve the use of the Financial Means Test in this case. Adding the language found in Musco’s prior permit (*see* Order No. R5-2010-0025, which states: “The Discharger may use a Financial Means Test or other similar method for providing financial assurances...,” and requires Financial Assurance Reports) allows for use of this mechanism that ensures “funds will be available in a timely fashion when needed.”¹²

Order R5-2014-0125 required Musco to provide and maintain Financial Assurances for the eventual clean closure of all Class II surface impoundments at the Tracy Facility as provided under Title 27 Section 22228, and permitted use of the financial assurance mechanisms not requiring set aside funding. Section F. of Order R5-2014-0125 (discussing Financial Assurances) repeatedly discusses different mechanisms that Musco could use, including mechanisms that do not require funding, thereby allowing Musco to choose from all available mechanisms. The language used in Order R5-2014-0125 read as follows:

"F. FINANCIAL ASSURANCE

1. By 17 April 2015, pursuant to Title 27 Section 22207, the Discharger shall submit a report showing that it has provided an adequate financial assurance mechanism(s) pursuant to CalRecycle-promulgated sections of Chapter 6 (Title 27 section 22200 et seq.) or established an irrevocable closure fund with the Central Valley Water Board named as beneficiary to ensure final closure of all Class II surface impoundments with the closure fund balance increasing proportional to estimated solids accumulation in the surface impoundments. The Discharger may use a financial assurance mechanism for closure funding as allowed pursuant to 27 CCR section 22207 and Chapter 6 (27 CCR section 22200 et seq.) if approved by the Executive Officer. The selected financial assurance mechanism(s) or initial irrevocable fund financial assurances balance shall be determined using the initial closure costs of all four surface impoundments as of 17 April 2015 and shall increase on a prorated basis to the final closure cost submitted by the Discharger in accordance with the cost estimate in the Closure Plan dated 21 May 2014 submitted as an ROWD addendum. The financial

¹² See 27 C.C.R. §22254(a)(2). Additional guidance on requirements for Financial Means Testing can be found in 14 C.C.R. Section 18493 related to its use for waste tires.

assurances mechanism(s) shall be one or a combination of the eligible mechanisms approved for closure listed in Title 27 Section 22228 for which the Discharger is eligible. For financial assurance mechanisms eligible for closure costs requiring funding, the Discharger shall either fully fund the mechanism by 17 April 2015 for estimated closure costs as of 17 April 2015 or may propose a payment schedule. If the Discharger proposes a payment schedule to fund the mechanism(s), the Discharger shall submit a report by 1 June 2015 showing the means and the schedule by which to fully fund the mechanism. For financial assurance mechanisms eligible for closure costs not requiring funding, the Discharger shall submit a report showing the mechanism is in place by 1 June 2015.

Musco requests that the Regional Board include similar language in the proposed WDR because there are no specified findings of water quality or other need to modify these requirements, or evidence to support any findings made. Prohibiting the use of particular financial assurance mechanisms is and should properly be limited to enforcement activities, as set forth in Title 27, section 22274(a).

Further, based on the fact that this language was adopted by the Regional Board in the past, the Regional Board clearly has ample discretion to go beyond the limitations in the Financial Means Test section of the regulations applicable to CalRecycle landfills since those limits do not apply to surface water impoundments or to the Regional Board in this case. Further, as stated above, the State Approved Mechanisms section provides ample discretion for the Regional Board to approve other alternative mechanisms.

For these reasons, if the Regional Board maintains Title 27 notwithstanding the arguments above, Musco requests that the WDR section on Financial Assurances include the following language updated since the last WDR was adopted with similar language.

"F. FINANCIAL ASSURANCE

1. Financial Assurances for Closure of Surface Impoundments

a. By 17 April 2019, the Discharger shall submit a report demonstrating it has, in accordance with Title 27, section 22207, subdivision (a), either:

- i. Established an irrevocable closure fund to pay for closure activities;
- ii. ~~Obtain~~Utilized a ~~not~~other financial assurance mechanism ~~expressly provided for with respect to closure listed activities under Title 27, Chapter 6, Article 2 [§ 2224028 et seq.]~~, or a combination of such mechanisms;¹³ or

¹³ The "Financial Means Test" is not a financial assurance mechanism expressly contemplated with regard to either closure or corrective action. (See Title 27, § 22246.) As authorized by Title 27, §22229.

iii. Obtained or established another mechanism not expressly provided for under Title 27, ~~Chapter 6, Article 2~~, but approved by the Executive Officer in writing, with a determination that the proposed mechanism provides financial assurances at least equivalent to those mechanisms ~~expressly provided for under Title 27, Chapter 6, Article 2 with respect to closure activities.~~

b. The Discharger's irrevocable closure fund or other financial assurances balance shall be determined using the initial closure costs of all surface impoundments as of 17 April 2019 and shall increase on a prorated basis to the final closure cost submitted by the Discharger in accordance with the cost estimate in the Closure Plan ~~mechanism shall be sufficient to pay for initial closure of each of the Discharger's four onsite surface impoundments at the Facility, in accordance with the Discharger's operative closure plan for each surface impoundment. (See Provision H.11; Finding 78.) The amount shall be individually prorated according to the operating life of each surface impoundment, particularly with respect to the accrual of accumulated solids estimated as of 1 June of each year.~~

2. Financial Assurances for Corrective Action

a. By 17 April 2019, the Discharger shall also submit a report demonstrating it has, in accordance with Title 27, section 22222, either:

i. Established an irrevocable fund to pay for corrective action;

ii. ~~Obtain~~Utilized another financial assurance mechanism ~~expressly provided for with respect to corrective action listed under Title 27, Chapter 6, Article 2 [§ 2222840 et seq.],~~ or a combination of such mechanisms; or

iii. Obtained or established another mechanism not expressly provided for with respect to corrective action under Title 27, ~~Chapter 6, Article 2~~, but approved by the Executive Officer in writing, with a determination that the proposed mechanism provides financial assurances at least equivalent to those mechanisms ~~expressly provided for under Title 27, Chapter 6, Article 2 with respect to corrective action.~~

b. The Discharger's irrevocable fund or other financial assurance mechanism shall be sufficient to address ~~known or~~¹⁴ reasonably foreseeable releases from its Class II surface impoundments. ~~This amount shall not be prorated.~~

3. Funding of Financial Assurance Mechanisms

¹⁴ [Note: there are no known releases.]

- a. If the funding of any financial assurance mechanism selected is required, ~~and no payment schedule is proposed, the mechanism shall be fully funded, in the amount required, as of 17 April 2019.~~
- b. ~~In lieu of immediate funding,~~ the Discharger may propose a graduated payment schedule for fully funding any of its chosen financial assurances.
- c. No later than 1 June 2019, the Discharger shall submit a report either (i) confirming ~~that its chosen funding mechanism(s) for are fully funded in the amount required, or and~~ (ii) proposing a graduated payment schedule capable of achieving full funding within an appropriate timeframe or, (ii) if no funding required, provide an updated closure plan and cost estimate along with a certified Financial Means statement, or demonstrate compliance with any other mechanism selected. (See Provision H.11.¹⁵) Annual certified updates to any Financial Means statement are due on June 1st of each following year after 2019.

Conclusion

In sum, Musco requests that the Regional Board update the proposed WDR Order for the Tracy Facility to accurately reflect application of the available Title 27 exemption. In that case, financial assurances would not be required. Should the Regional Board choose to not grant the exemption, or choose to continue to require financial assurances despite an exemption from Title 27, then Musco requests that the Regional Board permit Musco to determine the best means available for compliance with regulatory Financial Assurance requirements. Such an approach will ensure continued compliance with Water Code Sections 13360, 13000 and 13263, and appropriately balance the interests of the State and the regulated community.

Thank you for your consideration of these important issues. We respectfully request a meeting with key Regional Board staff or at least a conference call to discuss our concerns prior to the upcoming hearing to determine if there is a path forward to agreement and placing this WDR on the consent agenda.

Respectfully Submitted,

DOWNEY BRAND LLP



Melissa A. Thorne

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¹⁵ This section may need to be updated accordingly.